

DECISION

THE DEPARTMENT OF THE UNITED STATES
WASHINGTON, D.C. 20340

FILE: B-210082

DATE: July 19, 1983

MATTER OF: Servrite International, Ltd.

DIGEST:

1. It is not necessary to consider whether protest is timely where contracting agency acknowledges all the facts necessary to establish the validity of protester's objection and proposes corrective action.
2. Where offerors did not submit proposals on a common basis, award to low offeror was properly terminated. Moreover, claim for preparation costs by losing offeror is denied since it is not clear which offeror would have been successful in a competition on an equal basis.

Servrite International, Ltd. (Servrite), protested the award of a contract to Contact International, Inc. (Contact), under Naval Supply Center request for proposals (RFP) No. N100189-82-R-0233 on the basis that the offer of Contact was not the lowest acceptable offer under the terms of the RFP.

The contracting officer reviewed the RFP and concluded that it was ambiguous. Because the ambiguity may have prejudiced Servrite, the contracting officer decided to recompet the option years.

Servrite concurs in the contracting officer's decision. Servrite now claims preparation costs for the offer submitted under the RFP. (In view of the limited time remaining under the original contract, Servrite has not requested award of that contract for the time remaining.)

Contact, on the other hand, protests the decision to recompet. It contends that the RFP was unambiguous, that if the RFP was ambiguous, it was a patent ambiguity that Servrite raised untimely and that Servrite was not prejudiced by the award, so there is no need to recompet the option years.

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We deny the Contact protest, sustain the agency's actions in recompeting the option years, and deny Servrite's claim for preparation costs.

It is unnecessary for us to consider Contact's objection to the timeliness of Servrite's protest. We have held that where the contracting agency has acknowledged all the facts necessary to establish the validity of a protester's objection, there is no bar to a contracting agency proposing corrective action where it deems the circumstances to be appropriate. Introl Corp; Forster Enterprises, B-209096, B-209096.2, June 9, 1983, 83-1 CPD ____.

The RFP is for the operation of a dairy producing milk products at the Government plant in Guantanamo Bay, Cuba. Contact was the low offeror at \$387,836.06. Servrite was the next low offeror at \$489,149.11. The only other offeror was higher. Award was made to Contact.

On the matter of ambiguity, the RFP was unclear as to whether the cost of nonfat dry milk solids was to be included in the proposed prices for the offered dairy products. For example, some provisions of the RFP indicated that the offered prices should be exclusive of nonfat dry milk solids while another indicated that commercial nonfat dry milk solids should be included in the prices. The approach to be taken in the offers was raised at a preproposal conference. The prospective offerors were told at the conference that the offers should be based upon milk powder offered from commercial sources and that proposals will be evaluated on that basis.

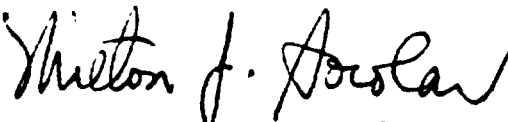
However, although the minutes of the conference were included in the RFP by a subsequent amendment, the minutes included a statement made at the conference that unless the RFP is amended, the RFP remains unchanged. The amendment also stated that the RFP closing date was extended "pending resolution of the issues discussed at the conference." Subsequent amendments made changes to various terms of the RFP, but none changed the RFP provisions with respect to the pricing issue. Thus, although the minutes were added to the RFP by amendment, neither the amendment nor any subsequent amendment revised the terms at issue in the RFP which were conflicting. This caused Contact to ask the contract

specialist, before submitting an offer, whether the provisions in the RFP pertaining to price were amended. The contract specialist advised that the terms of the RFP remained unchanged if not formally changed.

After Servrite protested the award to Contact, the contracting officer surveyed the offerors and found that Contact excluded the cost for the milk powder while Servrite and the only other offeror included it. Apparently, Contact, relying upon the advice of the contract specialist, concluded that the cost of milk powder was to be excluded. Servrite and the other offeror, apparently relying upon the statement made at the preproposal conference, concluded otherwise.

Contact has contended that because its offer would have been low in a proper negotiation, Servrite has not been prejudiced. Servrite, on the other hand, contends that its offer would have been low in a competition on an equal basis. Neither protester has clearly established its position as the low offeror. Moreover, if the contracting officer had become aware of the confusion generated by the solicitation during the evaluation process, the contracting officer might have decided to hold discussions and have another round of pricing. It is not clear who would have been the successful offeror in that event.

We deny Servrite's claim for proposal preparation costs because there is no showing that the action of the contracting officer in accepting Contact's offer was arbitrary or capricious. Even if we accept Servrite's position that the RFP was not ambiguous and that Contact should have included milk powder in its proposal, the record shows that the contracting officer was unaware that Contact had not done so until after the award. Mere negligence or lack of due diligence by the contracting officer will not support recovery of proposal preparation costs. Decision Sciences Corporation--Claim for Proposal Preparation Costs, B-196100.2, October 20, 1980, 80-2 CPD 298.

for 
Comptroller General
of the United States